RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TABLE OF CONTENTS

	Page
Respondents' Brief in Opposition to Petition for Writ of Certiorari:	
Counter-Statement of Questions Presented for Review	1
Corrections and Additions to Statement of the Case	2
Reasons for Refusing the Petition for Certiorari:	
I. The Third Circuit Court of Appeals Did Not Render a Decision in Conflict With Any Decision of Another Circuit Court of Appeals on the Same Matter	3
II. The Questions Presented by This Case Are Not Such as Require an Answer Thereto by the Supreme Court of the United States	6
Conclusion	7

TABLE OF CITATIONS

Cases:

Cotton v. Bennett, C.C.A. 4, 59 F. 2d 373, 21 A.B.R. (ns) 126 (1932), cert. den., 287 U.S. 646, 53 S. Ct. 92, 77 L. Ed. 559 (1933)	4
Fyne v. Atlas Supply Co., C.A. 4, 245 F. 2d 107 (1957)	5, 6
Hutchinson v. Otis, Wilcox & Co., 190 U.S. 552, 555, 23 S. Ct. 778, 47 L. Ed. 1179 (1903)	7
In re: Lipman, 2 Cir., 65 F. 2d 366	4
In re: Salvator Brewing Co., C.C.A. 2, 193 F. 989, 26 A.B.R. 21 (1912)	3

In re: Weco Equipment, Inc., 55 F. Supp. 532 aff'd sub. nom. 4

In re: W. H. Calder Co., 146 F. Supp. 389 (E.D. N.C., 1956), aff'd sub. nom. 5

J. B. Orcutt & Co. v. Green, 204 U.S. 96, 27 S. Ct. 195, 51 L. Ed. 390 (1903) 5

Public Operating Corp. v. Schneider, C.C.A. 2, 145 F. 2d 830 (1945) 4

Scottsville National Bank v. Gilmer, C.C.A. 4, 37 F. 2d 229, 15 A.B.R. (ns) 125 (1934) 5

STATUTE:

11 U.S.C. 93(n) 6,7

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Where the sole stockholder of a bankrupt corporation fails to file anything in writing concerning his claim within six months from the date of adjudication in bankruptcy, may he file an "Amended Proof of Claim" over three years after the statutory period has elapsed and be permitted to participate in the distribution of the proceeds in bankruptcy of the debtor corporation?

2. Where a referee in bankruptcy refuses to allow a claim to be filed because the time limit has expired and on a hearing before the District Court on creditor's petition for review the creditor fails to appear and prove any equities in his favor, should the claim be allowed to be filed and the creditor be allowed to participate in the distribution of the proceeds in bankruptcy of the debtor corporation?

CORRECTIONS AND ADDITIONS TO STATEMENT OF THE CASE

1. There is nothing in the record to show that Gora, the Petitioner, actually voted at the first meeting of creditors at which a Trustee was elected or at any other time.

2. The Referee's Order as to notice in the proceeding under Chapter XI (Page 6 of Petition for Certiorari) has nothing to do with the subsequent proceedings in bankruptcy as the Petitioner did not carry out the arrangement to which the creditors had agreed before the adjudication in bankruptcy.

3. The Trustee and his counsel did not object to Petitioner's claim until the alleged amended claim was presented because they assumed the claim had been filed. Until the "Amended Claim" was presented there was nothing to which to object.

4. Gora, the Petitioner, did not appear at the hearing before the District Court on the Petition for Review of Referee's Order refusing the filing of the claim. No equitable considerations were presented or proven.

REASONS FOR REFUSING THE PETITION FOR CERTIORARI

I. The Third Circuit Court of Appeals Did Not Render a Decision in Conflict With Any Decision of Another Circuit Court of Appeals on the Same Matter.

It is the contention of the Respondent that the decisions of the Second and Fourth Circuits cited by Petitioner on Page 7 of the Petition for Certiorari, are not actually in conflict with the case at bar. We submit that regardless of whether one Circuit is more liberal than another, if the facts of the case at bar were submitted to the Second and Fourth Circuits they could follow the decision of the Court below without reversing any of their own decisions.

In the case at Bar two factors are present which do not exist in any of the cases cited by Petitioner:

1. There was nothing filed or placed with the Referee, the Trustee, or the Court within the statutory period in the nature of an imperfect written claim.

2. There was no proof of equities in favor of the Petitioner.

The following is an analysis of the cases cited by Petitioner as being in conflict with the case at Bar:

In re: Salvator Brewing Co., C.C.A. 2, 193 F. 989 (1912):

1. Case is prior to 1938 amendments to Bankruptcy Act.

2. There was written proof of record within statutory period which could be amended.

3. The claim was admittedly just.

4. There was a security question which had to be litigated first and the claim was filed within the statutory period thereafter.

5. All the equities favored the claim.

In re: Weco Equipment, Inc., 55 F. Supp. 532, Aff. sub nom. *Public Operating Corporation v. Schneider*, C.C.A. 2, 145 F. 2d 830 (1945):

1. Referee actually received a letter from the creditor's attorney within statutory period stating that it was notice of the claim and that it would later be amended.

2. Second Circuit affirmed the case on authority of *In re Lipman*, 2 Cir. 65 F. 2d 366. In the *Lipman* case there was a document filed by the creditor with the Referee within the statutory period. Also due to an offer of compromise the other creditors were not affected by the allowance of the amended claim after the statutory period.

Cotton v. Bennett, C.C.A. 4, 59 F. 2d 373, cert. den., 287 U.S. 646, 53 S. Ct. 92:

1. This case is prior to 1938 amendments.

2. A letter setting forth the claim had been written by creditor to Trustee within the statutory period.

3. The equities were on the side of the creditor.

Scottsville National Bank v. Gilmer, C.C.A. 4, 37 F. 2d 227 (1934):

1. Case is prior to 1938 amendments.

2. The equities favored the creditor.

3. There was written correspondence from the creditor to the Trustee concerning the claim within the statutory period.

In re: W. H. Calder Co., 146 F. Supp. 389 (E.D. N.C. 1956), Aff. sub. nom., *Fyne v. Atlas Supply Company*, C.C.A. 4, 245 F. 2d 107 (1957):

1. Attorney for creditor wrote a letter to attorney for Trustee referring to the claim, within the statutory period.

2. The equities were on side of creditor.

3. The 4th Circuit held flatly that the Trustee's knowledge of the claim and its listing in the schedules was insufficient to permit an amended claim to be filed after the statutory period. The letter is stressed.

J. B. Orcutt & Co. vs. Green, 204 U.S. 96, 27 S. Ct. 195, 51 L. Ed. 390 (1903):

This case construes the Bankruptcy Act of 1898, so as to allow all creditors except the Trustee himself to file their claims with the Trustee.

The case at Bar has nothing to do with the problem of where to file a claim.

II. The Questions Presented by This Case Are Not Such as Require an Answer Thereto by the Supreme Court of the United States.

All that the Third Circuit decided in the case at Bar (Appendix A of Petition) is that if there is nothing in the record to amend (something in writing filed with the Referee, Trustee or District Court), no amendment will be permitted to be filed after the statutory period has expired.

The equities were not discussed because Gora, the petitioner, did not see fit to appear and present them in the Court below. In fact there is no evidence in the record that he actually voted at the election of the Trustee or any other time.

It was never agreed below that Gora had a just claim. It was always looked upon with disfavor by the Trustee and the other creditors.

There is no contention by Petitioner that mere knowledge of the claim on the part of the Trustee or its listing in the bankruptcy schedules is sufficient to constitute an amendable filing. *Fyne v. Atlas Supply Company*, C.C.A. 4, 245 F. 2d 107 (1957).

The decision below does not challenge the equitable powers of a Bankruptcy Court. It does not forbid amendments after the statutory period has passed if there is something to amend and the equities are present in favor of the creditor to justify the amendment. It does not require the original filing of a perfect proof of claim under Section 57 of the Bankruptcy Act (11 U.S.C.A. 93) as contended by petitioner on page 9 of the petition.

Reasons for Refusing the Petition for Certiorari

It is to be noted that in *Hutchinson vs. Otis, Wilcox & Co.*, 190 U.S. 552, 23 S. Ct. 778, 47 L. Ed. 1179 (1903), cited by petitioner (page 9 of Petition), an imperfect written claim had been filed within the statutory period.

In the case at Bar, if Gora had filed an imperfect written claim of some kind within the statutory period and then had proven equities in his favor and the Third Circuit had refused the filing of an amended claim as a matter of law, the petition for certiorari would have some merit.

We submit, however, that what the petitioner is really asking the Supreme Court of United States to do is to take for decision the question of whether Sec. 57(n) of the Bankruptcy Act (11 U.S.C. 93n) is a Statute of Limitations at all. That it is a Statute of Limitations we think is too well settled to require any argument.

CONCLUSION

The petition for a writ of certiorari to the Third Circuit Court of Appeals should be denied.

Respectfully submitted,

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